

Medical Marijuana Fee and Tax Report

February 3, 2012

Prepared by the Joint Fiscal Office

Summary

The Joint Fiscal Office is required to report on the projected revenue from the new fees established last session for medical marijuana dispensaries and the feasibility of a sales tax on medical marijuana (see Appendix A). The Department of Public Safety (DPS) is also simultaneously required to report on the projected fee income and expenses for implementing the act (2011 Act No. 65) to establish medical marijuana dispensaries in Vermont.¹ Therefore, the first part of this report is a summary of the fee revenue and expenses from experience with the registry and projections for the newly enacted dispensary program, with much of this information obtained from the DPS report. The second part of the report contains information from other states with taxes applied to medical marijuana.

Medical Marijuana Fee Revenue and Expenses

There are two components of the fee revenue: the marijuana registry and the dispensary program. Since 2004, patients and caregivers have an annual \$50 registration fee for the Vermont marijuana registry, which covers the costs of maintaining the registry at the DPS. The number of patients and caregivers has risen gradually, but with the implementation of the dispensary program, the numbers are expected to rise much more dramatically. The actual data to date suggest that the estimates provided last session were accurate (500 registered patients were projected, 411 have actually registered, and 70 registered caregivers were projected, and 68 have registered). The DPS expects the number of registered patients to reach the 1,000 maximum, which would almost double the revenue from these fees from approximately \$22,750 in FY11 to \$50,000.

Because the dispensary program has yet to be implemented, the estimates of the annual fee revenue from dispensary applications and licenses as well as the number of registered principals, board members, and employees are still projections and have not changed significantly. According to the DPS report, approximately \$91,600 revenue is anticipated from these fees if the program is implemented in a timely manner. Together, the revenue from these two sources is anticipated to cover the costs of the program as outlined in the DPS report. DPS has delayed hiring the newly approved administrator positions in order to guarantee that the fee revenues will be sufficient to cover the program expenses. After actual data is available from the implementation of the dispensary program, DPS should be able to more accurately assess the ongoing fiscal balance within this program. These fees will become part of the annual fee bill in the protection to persons and property area of government, which is reviewed every three years, next in 2013.

Taxation of Medical Marijuana

There is not a consistent approach to the taxation of medical marijuana in states that have allowed its sale for regulated purposes. The decision to tax medical marijuana and the type of tax applied has been determined in an ad hoc manner. In a few states, the tax intent of medical marijuana has been incorporated into the original law regulating dispensaries, but in most states the determination of the tax treatment has lagged behind the other regulatory aspects of state law. The chart shows the tax treatment of medical marijuana in the nine states and District of Columbia which allow its sale through government-regulated dispensaries or similar establishments.

¹ See Appendix A for the report requirements

STATE TAXATION OF MEDICAL MARIJUANA (sales through dispensaries)

State	Law and Year Passed	Dispensaries	Tax Applied	Revenue Actual/Estimate
Arizona	Arizona Medical Marijuana Act (2010) Proposition 203	Up to 124 dispensaries, openings delayed - none operational	6.6% Sales Tax; AZ Attorney General announced taxable	\$40 million sales tax estimate
California	Compassionate Use Act of 1996 Proposition 215 - voter initiative	Dispensaries and growing collectives licensed through local city or county business ordinances (500 - 1,000)	5.0% State Sales Tax; local sales taxes also Board of Equalization Special Notice - June 2007	\$21.4 million; 2007 state estimate \$58 - \$105 million 2012 estimate
Colorado	Colorado Medical Marijuana Act (2010) Original voter initiative in Nov 2000	667 dispensaries as of 12/1/11	5.0% State Sales Tax	\$5 million calendar year collections
Delaware	Delaware Medical Marijuana Act (2011)	3 Compassionate Care Centers	No sales tax; gross receipts tax (first \$1.2 million of gross receipts exempt from tax)	None
Maine	An Act to Amend the Medical Marijuana Act (2010)	8 dispensaries	5% Sales Tax and 7% Meals & Rooms Tax Sales Tax added 2010; Meals by Dept Ruling	\$500,000 sales tax estimate
New Jersey	New Jersey Compassionate Use Medical Marijuana Act (2010)	6 Alternative Treatment Centers (ATCs) approved, but not yet open	7% Sales Tax - (not sure if sales tax will apply)	None
New Mexico	The Lynn and Erin Compassionate Use Act (2010)	11 nonprofit dispensaries	Gross Receipts Tax – proposals to tax not passed	N/A
Rhode Island	The Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act (2009)	3 compassionate care centers	Compassion Center Surcharge - 4% of net patient revenue, paid monthly (RIGL Chapter 44-67-12) 7% Sales Tax will also be applied	No taxes collected yet. \$700K NPR estimate
Vermont	An Act Relating to Registering Four Nonprofit Organizations to dispense Marijuana for Symptom Relief (2011)	4 dispensaries	Tax treatment not explicit under current law	N/A
Washington D.C.	Amendment Act B18-622 - Council approved April 2010	10 dispensaries, separate cultivation centers	6% Sales Tax; District of Columbia City Council included sales tax in budget - June 15, 2010	\$400,000 sales tax estimate over 4 years

Data compiled by JFO from a variety of sources.

There are a number of states that have decriminalized medical marijuana and have possession limits but do not allow for its sale within the state – these are not included in the chart. In most states, if a tax is applied, it is the sales and use tax, but one has applied the meals tax to some marijuana-food products and one a provider tax-type model. A few states have legal opinions determining that medical marijuana is taxable but do not allow for its legal sale, such as Washington State. Therefore, there is little experience and even less actual data on the potential revenue from the taxation of medical marijuana.

California, Colorado, and Maine are the only states with some history of sales tax collection and medical marijuana. Below is a brief discussion of each:

California

California was the earliest state to allow medical marijuana dispensaries in 1996 after a voter initiative which did not consider the tax status of medical marijuana. Dispensaries and growing collectives are licensed through local governments. The state's tax department, the State Board of Equalization, did not issue seller's permits (authority to for venders to sell tangible personal property) until its policy changed in October 2005 and it began issuing the permits to businesses, even if the only property being sold was illegal. A Special Notice issued in June of 2007 notified sellers that medical marijuana is considered taxable and is not exempt as a prescribed medication. Non-prescription medications are taxable in California. The projected revenue in 2007 was \$21.4 million at the 5% state sales tax rate. Newer estimates place the state revenue between \$58.0 million and \$105.0 million from sales tax on medical marijuana.

Colorado

Colorado authorized dispensaries, with minimal state oversight, in November of 2000. Nine years later, in November 2009, the state's attorney general issued an opinion finding medical marijuana to be subject to the sales tax. The state began more regulation and oversight of dispensaries in general in 2010 and subsequently began tracking sales tax collections. In the calendar year between November 2010 and October 2011 the state collected \$5.1 million in sales tax revenue from dispensaries. This tax revenue is not limited to medical marijuana, but may also include other taxable tangible personal property sold by these businesses as well. There were 667 dispensaries licensed as of December 1, 2011 and approximately 80,500 patients are registered in Colorado.

Maine

Maine began applying the sales tax in 2010 when its law was amended to allow dispensaries. It is estimated that approximately \$500,000 of sales tax revenue will be collected from the eight authorized dispensaries. Subsequent to the law passing, the Tax Department also ruled that certain marijuana food products would also be subject to the state meals and rooms tax. There is no estimate on the revenue from the meals tax.

Other States

For a number of states in the chart, the authorization of medical marijuana dispensaries is relatively new, and many, although authorized, have not yet become operational or taxable. Arizona, Delaware, New Jersey, Rhode Island, Vermont, and Washington, D.C.

are all in the process of authorizing dispensaries. In a few of these places, the tax question was determined by the lawmakers or others in advance, while in several the issue of taxation remains unsettled. For example, in Arizona, the attorney general has announced that medical marijuana will be subject to the 6.6% sales tax when the state's dispensaries become operational. Rhode Island has in statute a 4% compassion center surcharge that operates similarly to a provider tax and has determined that the sales tax will also apply. Washington, D.C. voted to approve a sales tax on medical marijuana soon after the legislation approving dispensaries passed their City Council. Delaware, which has a gross receipts tax, New Jersey, and Vermont did not directly address the issue of taxation.

Vermont Summary

In Vermont, four dispensaries have been authorized, and the Department of Public Safety is working to implement the new law. It is anticipated that these facilities may open by the end of the year.

Although Vermont statute does not directly address the tax treatment of medical marijuana and no technical bulletins have been issued with regard to this issue by the Department of Taxes, it seems that medical marijuana will not likely be taxable. Vermont currently exempts both prescription and non-prescription drugs from the sales tax, along with dietary supplements, and medical marijuana may qualify under one of these existing definitions. The decision whether or not to apply taxes on medical marijuana should be made explicit in statute to avoid some of the issues experienced in other states. With the small number of dispensaries and existing state oversight, it would not appear to be administratively difficult to apply the sales tax to medical marijuana, and in some cases dispensaries may be required to collect the sales and use tax on other tangible personal property for sale in these establishments.

Based on the experience in other states, the estimated sales tax revenue from medical marijuana could range from \$80,000 to \$250,000 depending on a number of factors including the number of registered patients, the average sales price, the amount consumed, and if all four dispensaries are authorized. The lower range of the estimate is more likely in earlier years until the number of patients reaches higher levels. The cap on the number of registered patients at 1,000 is likely to limit the revenue potential.

APPENDIX A

Act No. 65. An act relating to registering four nonprofit organizations to dispense marijuana for symptom relief.

Sec. 2a. REPORT FROM THE DEPARTMENT OF PUBLIC SAFETY

The department of public safety shall report to the general assembly no later than January 1, 2012 on the following:

- (1) The actual and projected income and costs for administering this act.
- (2) Recommendations for how dispensaries could deliver marijuana to registered patients and their caregivers in a safe manner. Delivery to patients and caregivers is expressly forbidden until the general assembly takes affirmative action to permit delivery.
- (3) Whether prohibiting growing marijuana for symptom relief by patients and their caregivers if the patient designates a dispensary interferes with patient access to marijuana for symptom relief and, if so, recommendations for regulating the ability of a patient and a caregiver to grow marijuana at the same time the patient has designated a dispensary.

Sec. 2b. JOINT FISCAL OFFICE REPORT

No later than January 15, 2012, the joint fiscal office shall report to the house committee on ways and means and the senate committee on finance regarding the projected costs of administering this act, the projected fee revenue from this act, the feasibility of a sales tax on marijuana sold through registered dispensaries, and any other information that would assist the committees in adopting policies that will encourage the viability of the dispensaries while remaining, at a minimum, revenue neutral to the state.

Appendix B
Attachments

1. Arizona Attorney General Opinion RE: Transaction Privilege Tax Upon Medical Marijuana Sales, July 7, 2011
2. California State Board of Equalization Special Notice June 2007
3. Colorado Attorney General Opinion, November 16, 2009



STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by THOMAS C. HORNE ATTORNEY GENERAL July 7, 2011	No. I11-004 (R11-001) Re: Transaction Privilege Tax Upon Medical Marijuana Sales
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To: The Hon. Scott Bundgaard
Arizona State Senate

Questions Presented

You have asked for an opinion on the following questions:

1. Does current law require the State to impose a transaction privilege tax upon the sale of medical marijuana in Arizona?
2. Do medical marijuana dispensaries have a valid Fifth Amendment defense for the failure to file transaction privilege tax returns and pay the tax that is due?

Summary Answer

1. Under current law, the proceeds of medical marijuana sales are taxable under the retail classification of the transaction privilege tax.

2. Even though the distribution of marijuana is a federal crime, medical marijuana dispensaries do not have a valid Fifth Amendment defense to a generally applicable requirement to file transaction privilege tax returns and pay the tax that is due.

Background

In the November 2010 general election, Arizona voters approved Proposition 203, the Arizona Medical Marijuana Act (the “Act”), which legalized the sale of marijuana for use by individuals with “chronic or debilitating diseases” under specified circumstances. While both the distribution and possession of marijuana remain criminal offenses under the Controlled Substances Act (21 U.S.C. §§ 801 through 971), marijuana sales that comply with the requirements established under the Act are permitted under Arizona law.

Analysis

I. Medical Marijuana Sales Proceeds Are Taxable Under the Retail Classification of the Transaction Privilege Tax.

The State of Arizona imposes a 6.6% transaction privilege tax on persons or entities engaged in taxable business classifications. Arizona Revised Statutes (“A.R.S.”) § 42-5010; Ariz. Const. art. IX, § 12.1. The retail classification of the transaction privilege tax, more commonly known as the “sales tax,” is established under A.R.S. § 42-5061, which in relevant part provides as follows:

The retail classification is comprised of the business of selling tangible personal property at retail. The tax base for the retail classification is the gross proceeds of sales or gross income derived from the business.

The term “tangible personal property” is defined in A.R.S. § 42-5001(16) as “personal property which may be weighed, measured, felt or touched or is in any other manner perceptible to the senses.” There can be no doubt that marijuana, which can be weighed, measured, felt,

touched, seen, tasted and smelled, falls within the scope of this definition. Moreover, “selling at retail” means “a sale for any purpose other than for resale in the regular course of business in the form of tangible personal property.” A.R.S. § 42-5061(V)(3). Therefore, medical marijuana dispensaries will be engaged in “the business of selling tangible personal property at retail,” and unless an exemption applies, the proceeds of medical marijuana sales are taxable under the retail classification.¹

While section 4 of the Act amended A.R.S. § 43-1201 to exempt medical marijuana dispensaries from income tax, there is no analogous provision in the Act exempting the proceeds of medical marijuana sales from the transaction privilege tax. Therefore, the Act itself does not shield these proceeds from sales tax.

Nor are these transactions exempt from sales tax under more generally applicable rules. In particular, medical marijuana sales proceeds do not constitute tax-exempt proceeds of income derived from the sale of prescription drugs under A.R.S. § 42-5061(8), because the Act does not contemplate prescriptions for medical marijuana. Instead, an individual applying for a registry identification card from the Arizona Department of Health Services must submit “written certification” from a physician specifying the patient’s debilitating medical condition and stating that in the physician’s professional opinion, the patient is likely to benefit from the medical use of marijuana. A.R.S. § 36-2801(18). Medical marijuana is not “prescribed” by a physician under these circumstances because the physician is not directing the patient to use marijuana. Moreover, in contrast to the fact pattern under which a physician writes a prescription that is

¹ Nothing in A.R.S. § 42-5061 limits the retail classification to business activities that are lawful, and, as a general proposition, an unlawful activity may be subject to tax. *Marchetti v. United States*, 390 U.S. 39, 44 (1968) (noting that the unlawfulness of an activity does not prevent its taxation). Therefore, even illegal sales of marijuana are currently subject to transaction privilege tax under the retail classification. For obvious reasons, however, criminal enterprises do not voluntarily disclose their sales revenues or otherwise comply with tax obligations.

delivered to a pharmacy, medical marijuana certification is submitted to the Arizona Department of Health Services, rather than to an organization that dispenses medical marijuana.

The fact that licensed physicians are prohibited under federal law from prescribing “Schedule I” controlled substances (as defined in § 812 of the Controlled Substances Act), including marijuana, further supports the conclusion that medical marijuana certification submitted to the Arizona Department of Health Services does not amount to a “prescription” for purposes of the prescription drug exemption established under A.R.S. § 42-5061(8).² And, it is well-settled law that tax exemptions are narrowly construed; therefore, it is unlikely that a court would broaden the scope of the prescription drug exemption to include medical marijuana certification. *Ariz. Dep’t of Revenue v. Blue Line Distrib.*, 202 Ariz. 266, 266-67, ¶4, 43 P.3d 214, 214-15 (App. 2002) (“Tax exemption statutes are strictly construed against exemption.”).

The only other retail transaction privilege tax exemption that could potentially apply to medical marijuana sales is the exemption set forth under A.R.S. § 42-5061(4) for sales of tangible personal property made by a federally recognized § 501(c)(3) charitable organization. While section 3 of the Act provides that medical marijuana can be lawfully dispensed only by nonprofit entities, it states that “[a] registered nonprofit medical marijuana dispensary need not be recognized as tax-exempt by the Internal Revenue Service.” A.R.S. § 36-2806(A). This language implicitly recognizes that the distribution or dispensing of marijuana is a federal crime under the Controlled Substances Act, and it is therefore highly unlikely that the Internal Revenue

² In addition to meeting state law requirements, every person who dispenses a federally controlled substance must obtain registration from the United States Drug Enforcement Administration. 21 C.F.R. § 1301.11. This registration is available only for dispensing controlled substances listed on Schedules II, III, IV and V. 21 C.F.R. § 1301.13. Under the Controlled Substances Act, marijuana is listed as a Schedule I drug. 21 U.S.C. § 812(c). Therefore, marijuana cannot be dispensed under a prescription. *See also* 21 U.S.C. § 829 (governing “prescriptions” for controlled substances and establishing requirements associated with schedule II through V drugs only); *United States v. Oakland Cannabis Buyers’ Co-op*, 532 U.S. 483, 492 n.5 (2001) (noting that Schedule I drugs cannot be dispensed under a prescription).

Service would grant § 501(c)(3) status to a medical marijuana dispensary. In the unlikely event, however, that (1) a medical marijuana dispensary invites federal scrutiny by applying to the Internal Revenue Service for § 501(c)(3) status, and (2) such an application is granted, the proceeds of medical marijuana sales at that dispensary would be exempt from transaction privilege tax under current Arizona law.

In summary, neither of the only two potentially applicable tax exemptions are likely to apply, and sales of medical marijuana should therefore be treated as taxable sales of tangible personal property sold at retail for purposes of A.R.S. § 42-5061.

II. Fifth Amendment Analysis.

The Act does nothing to alter the fact that the distribution of marijuana for any purpose, including medical treatment, is a federal crime. It is therefore possible that a medical marijuana dispensary would take the position that a requirement to submit transaction privilege tax returns to the Arizona Department of Revenue amounts to compelled self-incrimination, which is prohibited under the Fifth Amendment edict that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”

As discussed below, however, there is no valid Fifth Amendment defense to a generally applicable requirement to file transaction privilege tax returns.

A. The Fifth Amendment Applies Where There Is an Appreciable Threat of Prosecution.

As a threshold issue, the Fifth Amendment privilege may be invoked only where there are substantial and real, and not merely trifling or imaginary, hazards of self-incrimination. *Marchetti*, 390 U.S. at 53; *Brown v. Walker*, 161 U.S. 591, 599-600 (1896) (quoting *Queen v. Boyes*, 1 B. & S. 311, 330 (Q.B. 1861) (“[T]he danger to be apprehended must be real and appreciable . . . not a danger of an imaginary and unsubstantial character, having reference to

some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct.”)). Therefore, the Fifth Amendment privilege against self-incrimination may be invoked by the medical marijuana dispensaries only if the threat of federal prosecution is real and appreciable.

In a widely circulated memorandum dated October 19, 2009 (known as the “Ogden Memorandum”), the United States Department of Justice provided the following advice to federal prosecutors in states that have enacted laws authorizing the medical use of marijuana:

[T]he disruption of illegal drug manufacturing and trafficking networks continues to be a core priority in the Department’s efforts against narcotics and dangerous drugs, and the Department’s investigative and prosecutorial resources should be directed towards these objectives. As a general matter, pursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana. For example, prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana, is unlikely to be an efficient use of limited federal resources. On the other hand, prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority of the Department.³

While this memorandum may provide reassurance to medical marijuana users and their caregivers, it may not reflect an intent to permanently divert federal resources away from prosecuting medical marijuana clinics that are in compliance with state law, as indicated by the following language in a February 1, 2011, letter from the United States Department of Justice to the Oakland City Attorney:

The prosecution of individuals and organizations involved in the trade of any illegal drugs and the disruption of drug trafficking organizations is a core priority of the Department. This core priority includes prosecution of business enterprises

³ A copy of this memorandum may be found on the website of the United States Department of Justice at <http://blogs.usdoj.gov/blog/archives/192>. On May 2, 2011, Arizona U.S. Attorney Dennis Burke issued a letter to the director of the Arizona Department of Health Services, Will Humble, reiterating the position taken in the Ogden Memorandum.

that unlawfully market and sell marijuana. Accordingly, while the Department does not focus its limited resources on seriously ill individuals who use marijuana as part of a medically recommended treatment regimen in compliance with state law as stated in the October 2009 Ogden Memorandum, we will enforce the CSA vigorously against individuals and organizations that participate in unlawful manufacturing and distribution activity involving marijuana, even if such activities are permitted under state law.⁴

It therefore appears possible that medical marijuana dispensaries in Arizona may be at risk of federal prosecution under the Controlled Substances Act. Because it cannot be assumed that a court would rule that there is no appreciable risk of federal prosecution under these circumstances, the merits of a Fifth Amendment defense to the tax filing requirement should be considered. As discussed below, however, Fifth Amendment jurisprudence does not allow the privilege against self-incrimination to be invoked in order to avoid generally applicable reporting requirements that do not target inherently suspect activities.

B. The Fifth Amendment Does Not Shield Medical Marijuana Dispensaries from a Generally Applicable Requirement to File Transaction Privilege Tax Returns.

A generally applicable requirement to file tax returns cannot be avoided on the basis of the Fifth Amendment privilege against self-incrimination, even if the information submitted would tend to incriminate a taxpayer. In *United States v. Sullivan*, 274 U.S. 259 (1927), the taxpayer, who sold liquor in violation of the National Prohibition Act, was convicted of failing to file an income tax return, and the U.S. Supreme Court concluded that “[i]t would be an extreme if not extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime.” *Id.* at 263-64. While this 1927 opinion consists of only five paragraphs, it is directly on point, and it continues to be cited with approval by modern courts.

⁴ A copy of this letter is available on the website for the Arizona League of Cities and Towns at http://www.azleague.org/event_docs/medical_marijuana0211/us_atty_letter.pdf.

Similarly, in 1971 the U.S. Supreme Court held that the Fifth Amendment privilege against self-incrimination was not infringed by a generally applicable statute that required a motorist involved in an accident to stop at the scene and provide his name and address, where (1) the statute was regulatory and noncriminal, (2) self-reporting was indispensable, and (3) the burden was on the public at large, as opposed to a highly selective group inherently suspect of criminal activities. *California v. Byers*, 402 U.S. 424, 430-31 (1971). The Court distinguished cases in which the privilege had been upheld by noting that “[i]n all of these cases the disclosures condemned were only those extracted from a highly selective group inherently suspect of criminal activities and the privilege was applied only in an area permeated with criminal statutes—not in an essentially noncriminal and regulatory area of inquiry.” *Id.* at 430 (internal quotation marks omitted).

In *Marchetti*, for example, the U.S. Supreme Court held that the defendant’s assertion of the privilege against self-incrimination constituted a complete defense to prosecution for the failure to register and pay an occupational tax on wagering. In that case, the Court recognized that wagering was a crime in almost every state, and that the tax was not imposed in an essentially noncriminal and regulatory area, but directed to a selective group inherently suspect of criminal activities. *Marchetti*, 395 U.S. at 47; *see also Haynes v. United States*, 390 U.S. 85, 100 (1968) (upholding Fifth Amendment privilege as a defense to a registration requirement for sawed-off shotguns, where requirement was directed principally at persons who were inherently suspect of criminal activities); *Leary v. United States*, 395 U.S. 6, 18 (1969) (upholding Fifth Amendment defense to provisions of the Marihuana Tax Act requiring the defendant to identify himself as an unregistered transferee of marijuana, a selective group inherently suspect of criminal activities.)

Here, there is no suggestion that the sales tax imposed under A.R.S. § 42-5061 is designed to require the disclosure of incriminating information. The taxable classification is the business of selling tangible personal property at retail, and retailers can hardly be characterized as a “select group that is inherently suspect of criminal activities.” Instead, the requirement to file transaction privilege tax returns generally applies to taxable business classifications and is not associated with criminal law enforcement efforts. As noted by the U.S. Supreme Court in *Byers*:

An organized society imposes many burdens on its constituents. It commands the filing of tax returns for income; it requires producers and distributors of consumer goods to file informational reports on the manufacturing process and the content of products, on the wages, hours, and working conditions of employees. Those who borrow money on the public market or issue securities for sale to the public must file various information reports; industries must report periodically the volume and content of pollutants discharged into our waters and atmosphere. Comparable examples are legion.

In each of these situations there is some possibility of prosecution—often a very real one—for criminal offenses disclosed by or deriving from the information that the law compels a person to supply. Information revealed by these reports could well be a link in the chain of evidence leading to prosecution and conviction. But under our holdings the mere possibility of incrimination is insufficient to defeat the strong policies in favor of disclosure called for by statutes like the one challenged here.

402 U.S. at 427-28. Therefore, notwithstanding the fact that transaction privilege tax returns filed by a medical marijuana dispensary might tend to incriminate the organization under federal law, the Fifth Amendment does not constitute a valid defense to a generally applicable requirement to report sales revenues and remit sales tax.

Conclusion

Under current law, the proceeds of medical marijuana sales are taxable under the retail classification of the transaction privilege tax. Moreover, medical marijuana dispensaries cannot

invoke a Fifth Amendment defense to a generally applicable requirement to file transaction privilege tax returns and pay the tax that is due.

Thomas C. Horne
Attorney General



Special Notice

STATE BOARD
OF EQUALIZATION

Information on Sales Tax and Registration for Medical Marijuana Sellers

450 N Street
Sacramento
California 95814

BOARD MEMBERS

BETTY T. YEE
First District
San Francisco

BILL LEONARD
Second District
Ontario/Sacramento

MICHELLE STEEL
Third District
Rolling Hills Estates

JUDY CHU
Fourth District
Los Angeles

JOHN CHIANG
State Controller

EXECUTIVE DIRECTOR
RAMON J. HIRSIG

Board website and
Member contact
Information:
www.boe.ca.gov

Taxpayers' Rights
Advocate
888-324-2798

Information Center
800-400-7115
TDD/TTY: 800-735-2929

1. What is the Board of Equalization's (BOE) policy regarding sales of medical marijuana?

The sale of medical marijuana has always been considered taxable. However, prior to October 2005, the Board did not issue seller's permits to sellers of property that may be considered illegal.

2. Is this a change of policy?

In October 2005, after meeting with taxpayers, businesses, and advocacy groups, the Board directed staff to issue seller's permits regardless of the fact that the property being sold may be illegal, or because the applicant for the permit did not indicate what products it sold. This new policy was effective immediately.

3. What does the amended BOE policy say?

BOE policy regarding the issuance of a seller's permit was amended to provide that a seller's permit shall be issued to anyone requesting a permit to sell tangible personal property, the sale of which would be subject to sales tax if sold at retail. Previously, the Board would not issue a seller's permit when sales consisted only of medical marijuana.

4. Who is expected to comply with the BOE policy by applying for a seller's permit?

Anyone selling tangible personal property in California, the sale of which would be subject to sales tax if sold at retail, is required to hold a seller's permit and report and pay the taxes due on their sales.

5. Over-the-counter medications are subject to sales tax, but prescribed medications are not. Where does medical marijuana, "recommended" by a physician, fit in?

The sale of tangible personal property in California is generally subject to tax unless the sale qualifies for a specific exemption or exclusion. Sales and Use Tax Regulation 1591, *Medicines and Medical Devices*, explains when the sale or use of property meeting the definition of "medicine" qualifies for exemption from tax.

Generally, for an item's sale or use to qualify for an exemption from tax under Regulation 1591, the item must qualify as a medicine *and* the sale or use of the item must meet specific conditions. Regulation 1591 defines a medicine, in part, as any substance or preparation intended for use by external or internal application to the human body in the diagnosis, cure, mitigation, treatment, or prevention of disease and which is commonly recognized as a substance or preparation intended for that use. A medicine is also defined as any drug or any biologic, when such are approved by the U.S. Food and Drug Administration to diagnose, cure, mitigate, treat, or prevent any disease, illness, or medical condition regardless of ultimate use.

In order to be exempt, a medicine must qualify under the definition, and it must be either (1) prescribed for treatment by medical professional authorized to prescribe medicines and dispensed by a pharmacy; (2) furnished by a physician to his or her own patients; or (3) furnished by a licensed health facility on a physician's order. (There are some other specific circumstances not addressed here such as being

furnished by a state-run medical facility or a pharmaceutical company without charge for medical research.)

Generally, all of these requirements must be fulfilled in accordance with state and federal law.

- 6. Many medical marijuana dispensing collectives consider themselves to be health care facilities. Are they exempt from applying for a seller's permit and paying sales tax for this reason?**

Regulation 1591 exempts the sale or use of medicines furnished by qualifying health care facilities. (See response to Question 5, above, regarding the requirements to qualify as an exempt medicine.) State law defines a qualifying "health facility" as either a facility licensed under state law to provide 24-hour inpatient care or a state-licensed clinic.

- 7. If I don't make any profit whatsoever from providing medical marijuana, do I still need to apply for a seller's permit?**

Yes. Not making a profit does not relieve a seller of his or her sales tax liability. However, whether or not you make a profit, like other retailers making taxable sales, you can ask your customers to reimburse you for the sales taxes due on your sales, if you fulfill the requirements explained in Regulation 1700, *Reimbursement for Sales Tax*.

As discussed in the response to Question 10, the Board may enter into a payment plan with a seller when the seller has difficulty meeting its tax liabilities. The Board has an Offers in Compromise Program that provides a payment alternative for individuals and businesses who have closed out their accounts.

- 8. Is there a way to apply for a seller's permit without divulging the product being sold?**

Yes. The Board will issue a seller's permit to an applicant who does not indicate the products being sold. The applicant, however, will be asked to sign a waiver acknowledging that his or her application is incomplete, which may result in the applicant not being provided with complete information regarding obligations as a holder of a seller's permit, or notified of future requirements by the Board related to the products sold. Applicants who do not wish to indicate the type of products they are selling should leave the line, "What items do you sell?" blank and discuss the issue with a Board representative regarding the incomplete application.

- 9. If I have been providing medical marijuana for some time, but have never applied for a seller's permit, will I owe any back taxes?**

Yes. As with any other seller who has operated without a permit, or who has failed to timely file and pay the taxes due, back taxes are owed on any taxable sales made, but not reported and paid. Generally, penalty and interest will also be due.

When you apply for a seller's permit and your application is processed, Board staff will provide sales and use tax returns from prior periods for you to report your sales of medical marijuana and any other products you may have sold, but did not report. You will need to use these returns to self-report all your sales beginning with the month you first started selling taxable products.

Once you have filed all your back returns, you will receive a current return for each reporting period in which you make sales. You will continue to receive a return until such time as you stop making sales and have notified the Board of the discontinuance of your business.

The Board, however, may grant relief from penalty charges if it is determined that a person's failure to file a timely return or payment was due to reasonable cause and circumstances beyond the person's control. If a seller wishes to file for such relief, he or she must file a statement with the Board stating, under penalty of perjury, the facts that apply. Sellers may use form BOE-735, *Request for Relief from Penalty*, available on the Board's website.

A seller who cannot pay a liability in full may be eligible for an installment payment agreement. Sellers in need of this type of plan should contact their local Board office, as eligibility is determined on a case-by-case basis.

10. Is there a deadline by which I must apply for a seller's permit?

All California sellers of tangible personal property the sale of which would be subject to tax if sold at retail are required to hold seller's permits. A seller's permit should be obtained prior to making sales of tangible personal property. If you are currently making sales of medical marijuana and you do not hold a seller's permit, you should obtain one as soon as possible. Sellers have a continuing obligation to hold a seller's permit until such time they stop making sales of products that are subject to tax when sold at retail.

11. Where will the money go that is collected from sellers paying this sales tax?

Sales tax provides revenues to the state's General Fund as well as to cities, counties, and other local jurisdictions where the sale was made.

12. Are these tax revenues tied to any specific programs in the state budget?

No. The tax from the sales of medical marijuana is treated the same as the tax received from the sale of all tangible personal property.

13. Does registering for a permit make my sales of medical marijuana any more lawful than they are currently?

Registering for a seller's permit brings sellers into compliance with the Sales and Use Tax Law, but holding a seller's permit does not allow sales that are otherwise unlawful by state or federal law. The Compassionate Use Act of 1996 decriminalized the cultivation and use of marijuana by certain persons on the recommendation of a physician. California's Medical Marijuana Program Act also exempted qualifying patients and primary caregivers from criminal sanctions for certain other activities involving marijuana. Apart from any provisions of state law, the sale of marijuana remains illegal under federal law.

14. Where can I find more information?

Sellers are encouraged to use any of the resources listed below to obtain answers to their questions. They may:

- Call our Information Center at 800-400-7115.
 - Request copies of the laws and regulations that apply to their business.
 - Write to the Board for advice. Note: For a taxpayer's protection, it is best to get the advice in writing. Taxpayers may be relieved of tax, penalty, and interest charges that are due on a transaction if the Board determines that the person reasonably relied on written advice from the Board regarding the transaction. For this relief to apply, a request for advice must be in writing, identify the taxpayer to whom the advice applies, and fully describe the facts and circumstances of the transaction.
 - Attend a basic class on how to report sales and use taxes. A listing of these classes is available on the Board's website at www.boe.ca.gov/sutax/tpsched.htm. This page also includes a link to an on-line tutorial for Sales and Use Tax.
 - Contact a local Board office and talk to a staff member.
-



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FORMAL
OPINION

OF

JOHN W. SUTHERS
Attorney General

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No. 09-06

AG Alpha No. EX AD AGBDD

November 16, 2009

Governor Bill Ritter, Jr., through his Chief Legal Counsel Thomas M. Rogers, III, requested an opinion from this office regarding the applicability of state sales tax to the purchase and sales of medical marijuana.

QUESTIONS PRESENTED AND SHORT ANSWERS

The Governor's Chief Legal Counsel presented the following six questions:

Question 1. Is medical marijuana "tangible personal property" subject to the state sales tax under the Colorado tax code, section 39-26-104(1)(a), C.R.S.?

Answer 1. Yes. Medical marijuana is tangible personal property and is subject to the state sales tax, unless eligible for a specific sales tax exemption.

Question 2. Do transactions involving medical marijuana constitute "sales of drugs dispensed in accordance with a prescription" such that they would qualify for tax exemption under section 39-26-717(1)(a), C.R.S.?

Answer 2. No. Medical marijuana is not dispensed in accordance with a prescription.

Question 3. Do medical marijuana transactions qualify for the agricultural tax exemptions under section 39-26-716, C.R.S.?

Answer 3. Generally not, except as discussed in response to Question 4, below.

Question 4. Does the form of marijuana sold or purchased alter the tax treatment of the transaction?

Answer 4. Yes. Pursuant to section 39-26-716(4)(b), C.R.S., all sales and purchases of seeds are exempt from sales tax in Colorado. Other forms of marijuana sold or purchased would not qualify for this sales tax exemption.

Question 5. Regardless of the legality of the activity, are individuals and enterprises that engage in the sale of medical marijuana pursuant to Amendment 20 required to obtain a license and otherwise comply with the requirements of section 39-26-103, C.R.S.?

Answer 5. Yes. Unless subject to a particular exemption, it is unlawful under section 39-26-103(1)(a), C.R.S., for any individual or enterprise to engage in the business of selling at retail without first having obtained a retail sales license issued by the Colorado Department of Revenue.

Question 6. If such transactions are taxable, whose obligation is it to collect and remit any sales tax due for the purchase or sale of medical marijuana?

Answer 6. The obligation to collect and remit sales tax due is borne by the vendor.

BACKGROUND

In 2000, Colorado voters amended the Colorado Constitution by adopting an amendment (hereinafter “Amendment 20”) authorizing the medical use of marijuana for persons suffering from defined “debilitating medical conditions.”¹

Amendment 20 left many legal questions unanswered. The Blue Book² circulated in connection with Amendment 20 stated that under the proposed amendment, possession of marijuana would be permitted for patients who have registered with the state, but distribution of marijuana would still be illegal in Colorado.³ Consequently, Amendment 20 provides certain protections from state criminal liability for qualifying patients and primary caregivers, but “nothing in the amendment protects their original suppliers from prosecution or conviction on drug-related charges.”⁴

¹ Colo. Const. art. XVIII, § 14 (hereinafter “Amendment 20”).

² The “Blue Book” is the explanatory publication of the Legislative Council of the Colorado General Assembly. It is not binding, but “provides important insight into the electorate’s understanding” when passing a Colorado constitutional amendment and “also shows the public’s intentions in adopting the amendment.” *People v. Clendenin*, --- P.3d ---, 2009 WL 3464306 *5 (October 29, 2009), citing *Grossman v. Dean*, 80 P.3d 952, 962 (Colo. App. 2003).

³ Colorado Legislative Council, Research Pub. No. 475-6, *An Analysis of 2000 Ballot Proposals* 1 (2000), cited in *People v. Clendenin*, --- P.3d ---, 2009 WL 3464306 *5 (October 29, 2009).

⁴ *Id.* at *7 (Loeb, J., specially concurring).

Further complicating the application of Amendment 20, federal law prohibits the manufacture, distribution, dispensing, or possession with intent to manufacture, distribute or dispense marijuana.⁵ The United States Supreme Court has held that under the Supremacy Clause of the United States Constitution, where federal and state law conflict, federal law prevails.⁶ In another case, the Court has upheld application of federal law to enjoin distribution of medical marijuana under a California law that is similar to Amendment 20.⁷

Nevertheless, fourteen states, including Colorado, currently have laws in some form addressing the use of marijuana for medical purposes.⁸ On October 19, 2009, the United States Department of Justice issued a memorandum addressing the issue (hereinafter, “Department of Justice Memorandum”). The Department of Justice Memorandum clarified that compliance with a state’s medical marijuana laws does not constitute a defense to a charge under 21 U.S.C. § 841 and related provisions, but it stated that United States Attorneys should not “focus” federal resources on individuals “whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”⁹ Recently, Colorado has witnessed a surge in dispensaries providing medical marijuana to patients.

Despite the legal confusion surrounding the medical marijuana industry, the taxation question is relatively straightforward. Colorado’s sales tax applies to “the purchase price paid or charged upon all sales and purchases of tangible personal property at retail.”¹⁰ Colorado law contains no sales tax exemption for legally prohibited or otherwise unauthorized sales. Sales of medical marijuana are subject to state sales tax, unless a specific sales tax exemption applies.

DISCUSSION

Question 1. *Is medical marijuana “tangible personal property” subject to the state sales tax under the Colorado tax code, section 39-26-104(1)(a), C.R.S.?*

Colorado imposes a tax on “the purchase price paid or charged upon all sales and purchases of tangible personal property at retail.”¹¹ Tangible personal property means corporeal personal property.¹² “Retail sale” is defined as “all sales made within the state except wholesale sales.”¹³ The Colorado Department of Revenue (“Revenue”) further defines “tangible personal property” via regulation as follows:

⁵ 21 U.S.C. § 841(a)(1); 21 U.S.C. § 812(c).

⁶ *Gonzales v. Raich*, 545 U.S. 1, 29 (2005).

⁷ *See U.S. v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483 (2001).

⁸ <http://www.justice.gov/opa/pr/2009/October/09-ag-1119.html>

⁹ <http://blogs.usdoj.gov/blog/archives/192>.

¹⁰ § 39-26-104(1)(a), C.R.S.

¹¹ § 39-26-104(1)(a), C.R.S.

¹² § 39-26-102(15), C.R.S.

¹³ Section 39-26-102(9), C.R.S.

“Tangible personal property” embraces all goods, wares, merchandise, products and commodities, and all tangible or corporeal things which are dealt in, capable of being processed or exchanged¹⁴

Under the plain language of both the statutory and the regulatory definition of “tangible personal property,” medical marijuana constitutes tangible personal property subject to state sales tax, unless it qualifies for a specific sales tax exemption.¹⁵

Question 2. *Do transactions involving medical marijuana constitute “sales of drugs dispensed in accordance with a prescription” such that they would qualify for tax exemption under section 39-26-717(1)(a), C.R.S.?*

The State of Colorado applies its sales tax provisions broadly.¹⁶ In construing tax statutes there is a strong presumption that taxation is the rule and exemption the rare exception.¹⁷ The burden is on the taxpayer who claims an exemption to establish clearly the right to such an exemption.¹⁸ Like Colorado courts, “[u]nless the statutes and the constitution place the property within a stated category of exemption, we resolve doubts regarding the meaning of statutes and the constitution in favor of subjecting the property to payment of its fair proportion of taxation.”¹⁹

Section 39-26-717(1)(a), C.R.S., exempts from state sales tax, among other items, “[a]ll sales of drugs dispensed in accordance with a prescription.” The words “prescription” and “dispensed” are medical terms not defined within state statutes governing sales tax, but are further discussed in regulation. Revenue’s rule defining “prescription” for purposes of the sales tax exemption in section 39-26-717(1)(a), C.R.S. provides as follows:

A “prescription” means any order in writing, dated and signed by a practitioner, or given orally by a practitioner, and immediately reduced to writing by the pharmacist, assistant pharmacist, or pharmacy intern, specifying the name and address of the person for whom a medicine, drug, or poison is ordered and directions, if any, to be placed on the label.”²⁰

¹⁴ Revenue Regulation 39-26-102.15, 1 C.C.R. 201-4 (further language setting forth inapplicable exemptions omitted).

¹⁵ See *Telluride Resort and Spa, L.P., v. Colorado Department of Revenue*, 40 P.3d 1260, 1264 (Colo. 2002) (“In taxation matters, we commence our analysis with the statutory provisions.”).

¹⁶ See *A.D. Store v. Department of Revenue*, 19 P.3d 680, 682 (Colo. 2001).

¹⁷ *Colorado Dept. of Revenue v. Woodmen of the World*, 919 P.2d 806, 810 (Colo. 1996).

¹⁸ *Id.*

¹⁹ *Telluride Resort and Spa, L.P. v. Colo. Department of Revenue*, 40 P.3d 1260, 1264 (Colo. 2002).

²⁰ Department of Revenue Regulation 39-26-717.1, 1 C.C.R. 201-4.

Under Amendment 20, no such prescription is contemplated. Instead, a physician merely provides written documentation that a patient has a debilitating medical condition and “might benefit from the medical use of marijuana.”²¹

Moreover, under federal law, marijuana – medical or otherwise – cannot be distributed by prescription. In addition to meeting any state licensure and regulatory requirements, any individual or entity aspiring to dispense a controlled substance must comply with federal law and obtain a registration from the United States Drug Enforcement Administration (“DEA”).²² Such registration is available only for dispensing of schedules II through V controlled substances.²³ Under federal law, marijuana is a schedule I controlled substance.²⁴ Unlike drugs in other schedules, schedule I controlled substances cannot be dispensed under a prescription.²⁵

Sales of medical marijuana are not and cannot be “dispensed in accordance with a prescription” and therefore are not exempt from sales tax pursuant to section 39-26-717(1)(a), C.R.S.

Question 3. *Do medical marijuana transactions qualify for the agricultural tax exemptions under section 39-26-716, C.R.S.?*

Question 4. *Does the form of marijuana sold or purchased alter the tax treatment of the transaction?*

Section 39-26-716, C.R.S., exempts several agriculturally-related products from state sales tax. The majority of the provisions listed under section 716 are not applicable to retail sales of medical marijuana. Subsection 4(b) of section 716, however, exempts from state sales tax “all sales and purchases of seeds.” Marijuana sold in the form of seeds would qualify for this exemption. Marijuana sold in the form of leaves, buds, flowers or plants would not qualify, and would be subject to sales tax.

Section 39-26-707(1)(e), C.R.S., generally exempts sales of food from sales tax. Marijuana sold in the form of food would not qualify for this exemption, however. Revenue Regulation 26-102.4.5, 1 C.C.R. 201-4, clarifies that the following items do not constitute “food” and do not qualify for sales tax exemption under section 39-26-707(1)(e), C.R.S.: medicines, therapeutic products and deficiency correctors such as vitamins and minerals, cod liver oil,

²¹ Colo. Const. art. XVIII, §§ 14(2)(a)(I) and (II); (2)(c)(I) and (II), and (3)(b)(I).

²² 21 C.F.R. § 1301.11.

²³ 21 C.F.R. 1301.13.

²⁴ 21 U.S.C. § 812(c).

²⁵ See also 21 U.S.C. § 829 (governing “prescriptions” and describing requirements associated with schedule II through V controlled substances only); *U.S. v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483, 492 n5 (2001) (Schedule I drugs cannot be dispensed under a prescription).

and “other such items which are primarily used for medicinal purposes or as health aids.”²⁶ By definition, any food product containing medical marijuana and sold pursuant to Amendment 20 must be used “for medicinal purposes” and would not be exempt from sales tax under section 39-26-707, C.R.S.

Question 5. *Regardless of the legality of the activity, are individuals and enterprises that engage in the sale of medical marijuana pursuant to Amendment 20 required to obtain a license and otherwise comply with the requirements of section 39-26-103, C.R.S.?*

As discussed in the Background section above, distribution of medical marijuana is illegal under federal law. Except where transfer of medical marijuana between a primary care-giver and a patient is authorized by Amendment 20, distribution of marijuana is also illegal under state law.²⁷ Regardless of the legality of the activity, however, individuals and enterprises that engage in the sale of medical marijuana pursuant to Amendment 20 are required to obtain a retail sales tax license and otherwise comply with the requirements of section 39-26-103, C.R.S. Unless subject to a particular exemption, it is unlawful for any person to engage in the business of selling at retail without first having obtained a retail sales license granted and issued by the executive director of Revenue.²⁸

Colorado is not the first state to consider this question. In February 2007, the California State Board of Equalization, which collects California’s state sales and use tax, issued a “Special Notice” clarifying that those who sell medical marijuana in the state of California must hold a seller’s permit and are generally subject to sales tax.²⁹ The “Special Notice” explains: “Having a seller’s permit does not mean you have the authority to make unlawful sales. The permit only provides a way to remit any sales and taxes due.”³⁰

This analysis is consistent with federal treatment of illegally obtained income. While the federal government does not impose a sales tax, for federal income tax purposes, “gross income” includes income derived from illegal sources.³¹

Thus, under both federal and state tax law, an individual or business must pay applicable tax even if the taxpayer is noncompliant with the law, and even the taxpayer sells an illegal product. Failing to obtain the required sales tax license and remit required sales taxes would add another illegality to the operation.

²⁶ Revenue Regulation 26-102.4.5, 1 C.C.R. 201-4, paragraphs (b)(8) and (9). See also Revenue Regulation 26-707.1(e), 1 C.C.R. 201-4, and § 39-26-102(4.5), C.R.S.

²⁷ See, e.g. § 18-1-406(8)(b), C.R.S. (offenses related to marijuana); Colo. Const. art. XVIII, § 14(2)(a) and (2)(b) (defenses under Amendment 20); and § 18-1-406.3, C.R.S. (statutory provision governing medical use of marijuana in light of Amendment 20).

²⁸ § 39-26-103(1)(a), C.R.S.

²⁹ See <http://www.boe.ca.gov/news/pdf/medseller2007.pdf>.

³⁰ *Id.*

³¹ 26 U.S.C. § 61; 26 C.F.R. § 1.61-14. But see 26 U.S.C. § 280E (disallowing any income tax deduction or credit for any amount paid or incurred in carrying on any trade or business activities related to trafficking in schedule I or II controlled substances prohibited by state or federal law).

A state retail sales tax license does not represent an endorsement of an enterprise's compliance with the law and does not legitimize an illegal act. As under federal tax law, however, state tax law should not allow an individual or business engaged in an unlawful or potentially unlawful enterprise to avoid tax liability.

Under Colorado law, an individual or enterprise that engages in the sale of marijuana pursuant to Amendment 20 (or otherwise, for that matter) must obtain a retail sales tax license and comply with the requirements of section 39-26-103, C.R.S.

Question 6. *If such transactions are taxable, whose obligation is it to collect and remit any sales tax due for the purchase or sale of medical marijuana?*

The obligation to collect and remit sales tax due is borne by the vendor.³² The retailer must add the tax imposed, or the average equivalent thereof, to the sales price or charge, showing such tax as a separate and distinct item.³³ When added, such tax constitutes a part of the price or charge and is a debt from the consumer to the retailer.³⁴ All sums of money paid by the purchaser to the retailer as taxes constitute public money, the property of the state in the hands of such retailer, who holds the same in trust for the sole use and benefit of the State until paid to Revenue.³⁵

Revenue Regulation 26-104.1(a), 1 C.C.R. 201-4, explains: "The tax is imposed upon the purchaser. However, if the transaction involves a licensed vendor, the duty is imposed upon the vendor to add the tax to the sales price and to collect and remit the tax to the state." The sales tax constitutes a part of the price, and is a debt from the consumer or user to the vendor or retailer until paid.³⁶ The vendor, however, is liable for remitting payment of the amount of the sales tax to Revenue, regardless of whether the vendor has actually collected from the consumer.³⁷

³² See § 39-26-105(1)(a), C.R.S.

³³ § 39-26-106(2)(a), C.R.S.

³⁴ *Id.*

³⁵ § 39-26-118(1), C.R.S.

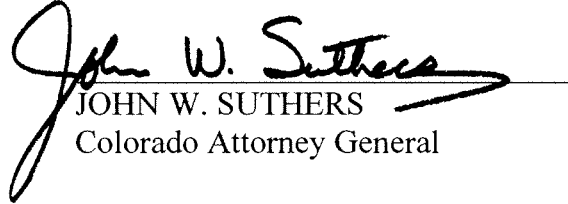
³⁶ § 39-26-106(2)(a), C.R.S.

³⁷ § 39-26-105(1)(a), C.R.S.

CONCLUSION

Medical marijuana is tangible property that is generally subject to state sales tax. Any individual or enterprise engaged in the sale of medical marijuana therefore must obtain a retail sales license from Revenue, and must collect and remit all state sales tax due.

Issued this 16th day of November, 2009.


JOHN W. SUTHERS
Colorado Attorney General